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IN THE

Supreme Court of the United States

October Term, 1954

No. 158

UNITED STATES OF AMERICA EX REL. AUDREY M. TOTH,
Petitioner,

v.

HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE, *Respondent.*

BRIEF OF PETITIONER

AL. PHILIP KANE
CHARLES V. KOONS
WILLIAM A. KEHOE, JR.
KANE AND KOONS
1331 G Street, N. W.
Washington 5, D. C.,

JOHN J. McGRATH
Grant Building
Pittsburgh, Pennsylvania
Attorneys for Petitioner

Of Counsel:

PETER F. FLAHERTY
JOSEPH H. RIDGE
JAMES F. SMITH
L. PAT McGRATH
Grant Building
Pittsburgh, Pa.

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Questions Presented	4
Statement of the Case	5
Summary of Argument	8
Argument:	
I. Congress has no power under the Constitution to enact legislation providing for the court-martial of a civilian	14
A. Congress cannot by legislative fiat make one, who has no connection with the military forces, a soldier for the sole purpose of military trial and punishment	14
B. Congress lacks the power to enact valid legislation providing for the court-martial and trial of civilians who are not connected in any way with the military forces	17
C. The power of Congress to enact legislation providing for the court-martial of a civilian is expressly and completely barred by the Fifth and Sixth Amendments	21
1. The history of the excepting clause of the Fifth Amendment	23
2. The meaning of the word "case" as used elsewhere in the Constitution	27
3. Interpretations given the word "case" as used in the excepting clause of the Fifth Amendment	30
D. Article 3(a) of the Uniform Code of Military Justice deprives the civilian citizen of all personal rights guaranteed in the Constitution	35

Page

II. There is no provision in the Uniform Code of Military Justice which authorizes the apprehension, confinement and trial by courts-martial of civilians who had formerly been in military service, but who had been discharged prior to any accusation being made against them..... 37

A. Despite a legislative purpose expressed in Article 3(a) to make the honorably discharged civilian amenable to trial by courts-martial, Congress failed to enact legislation necessary to permit such a person to be held for trial or to be tried in such a manner..... 37

B. There is no legislation enacted by the Congress which authorizes the confinement or physical restraint of an honorably discharged civilian by the military 38

C. There is no legislation enacted by the Congress which authorizes the apprehension or arrest of an honorably discharged civilian by the military for an offense committed prior to discharge 40

III. The apprehension and confinement of a civilian citizen by military authorities for trial by court-martial is completely devoid of any sanction in law and is completely foreign to the concepts of the guarantees of personal liberty which are embodied in the Constitution 43

Conclusion 45

Appendix 47

CITATIONS

CASES:

Aetna Life Insurance Company v. *Haworth*, 300 U.S. 227 28
Burns v. *Wilson*, 346 U.S. 137 ..... 16, 22
Counselman v. *Hitchcock*, 142 U.S. 547 ..... 10, 28, 29
Dynes v. *Hoover*, 61 U.S. (20 Howard) 65 22
Ex parte Henderson, 11 Fed. Cas. 1067 (C.C.D. Ky. 1878) 11, 34

Page

Ex parte Joly, 290 Fed. 858 (S.D.N.Y. 1922) 30
Ex parte Lange, 85 U.S. (18 Wall.) 163 .....26, 29, 31
Ex parte Mason, 105 U.S. 696 .....16, 22
Ex parte Milligan, 4 Wall. 2 .....8, 11, 13, 16, 23, 32, 34, 35, 44
Ex parte Quirin, 317 U.S. 1 35
Ex parte Reaves, 121 Fed. 848 35
Ex parte Wilson, 33 F. (2d) 214 (D.C.E.D. Va. 1929) 10, 16, 30, 35
Gaston v. *United States*, 79 U.S. App. D.C. 37, 143 F. (2d) 10, cert. denied 322 U.S. 764 14
Hirshberg v. *Cooke*, 336 U.S. 210 .....15, 35
In re Bogart, 3 Fed. Cas. 796 (C.C.D. Calif. 1873) 10, 11, 30, 32, 33, 34
In re Grimley, (*United States* v. *Grimley*), 137 U.S. 147 .....8, 15
Kronberg v. *Hale*, 180 F. (2d) 128 (C.C.A. 9th 1950) 30
Kurtz v. *Moffitt*, 115 U.S. 487 18
Morrissey v. *Perry*, 137 U.S. 157 15
Muskrat v. *United States*, 219 U.S. 346 28
Noble v. *Union River Logging R. Co.*, 147 U.S. 165 .. 15
Osborn v. *Bank of the United States*, 9 Wheat. (22 U.S.) 738 .....10, 27, 32
Reaves v. *Ainsworth*, 219 U.S. 296 .....16, 17, 22, 35
Re Pacific R. Commission, 32 Fed. 241 .....10, 27
Stoll v. *Gottlieb*, 305 U.S. 165 15
Terry v. *United States*, 2 F. Supp. 962 (W.D. Wash. 1933) 30
Toth v. *Talbott*, 114 F. Supp. 468 7
United States v. *Bogart*, 3 Ben. 257, 24 Fed. Cas. 1184 (D.C.E.D.N.Y. 1869) 33
United States v. *Hildreth*, 61 F. Supp. 667 (E.D.N.Y. 1945) 30
United States v. *Patterson*, 150 U.S. 65 .....10, 29, 30
U.S. ex rel. Flannery v. *Commanding General*, 69 F. Supp. 661 (D.C.S.D.N.Y. 1946) 10, 30, 35
U.S. ex rel. Marcus v. *Hess*, 317 U.S. 537 33
U.S. ex rel. Santantonio v. *Warden*, 265 F. 787 (D.C.E.D.N.Y. 1919) 30, 35
U.S. ex rel. Viscardi v. *MacDonald*, 265 F. 695 (D.C. E.D.N.Y. 1920) 30, 35
Wise v. *Withers*, 7 U.S. (3 Cranch) 331 .....8, 15, 16
Wong Wing v. *United States*, 163 U.S. 228 .....11, 37

Page

CONSTITUTION:

Article 1, Section 8
Clause 12 ..... 2, 4, 8, 9, 17, 19, 38, 43
Clause 14 ..... 2, 4, 8, 9, 17, 20, 38, 43
Article 3, Section 2 ..... 10, 27
Fifth Amendment 2, 4, 9, 10, 11, 13, 21, 22, 29, 30, 34, 35, 36, 38, 43
Sixth Amendment 2, 4, 9, 11, 21, 22, 29, 30, 35, 36, 38, 43

STATUTES:

Title 10, United States Code, Section 20s, 64 Stat. 323 ..... 8, 19
Title 10, United States Code, Section 1831, 65 Stat. 329 ..... 8, 19, 20
Title 18, United States Code, Section 702, 62 Stat. 732, amended 63 Stat. 91 14
Title 28, United States Code, Section 1254, 62 Stat. 928 2
Uniform Code of Military Justice, 50 U.S.C. § 551, *et seq.*, 64 Stat. 107-145

Article 2 ..... 13, 43
Article 3(a) 3, 4, 11, 12, 15, 16, 21, 22, 35, 36, 38, 40, 44, 45
Article 7(a) 3, 40, 41
Article 7(b) 3, 12, 13, 40, 41, 43
Article 9(a) 3, 12, 38, 40
Article 9(c) 3, 12, 39, 40
Article 56 ..... 14, 45
Article 81 22
Article 86(3) 45
Article 87 45
Article 118 22

STATUTES:

Act of March 2, 1863 (12 Stat. 696) 11, 32, 34, 42
Federal Rules of Criminal Procedure
Rule 5 17
Rule 40 17

Page

MISCELLANEOUS:

American Jurisprudence, Vol. 4, Arrest, Sec. 22.... 41
Congressional Globe, 37th Cong. 3d Sess 32
Declaration of Independence 18
Documentary History of the Constitution of the United States of America (Department of State, 1894) 24, 25, 26
Executive Order 10247, May 29, 1951 (16 F.R. 5035) 14, 45
Federalist, The 19
Manual For Courts-Martial, United States, 1951 (16 F.R. 1303-1469) 12, 13, 39
Winthrop, Military Law and Precedents (2d Ed. 1906) .....8, 17, 19, 20.

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HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE, *Respondent.*

BRIEF OF PETITIONER

OPINIONS BELOW

The opinions of the district court are reported *sub nom.*, *Toth* v. *Talbott* at 113 F. Supp. 330 (D.C.D.C. 1953) and at 114 F. Supp. 468 (D.C.D.C. 1953) and are contained in the record at pages 21-23 and 30-33. The opinion of the Court of Appeals is reported at 215 F. (2d) 22, U.S. App. D.C. , and is contained in the record at pages 37-50.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit were entered on March 25, 1954. (R. 51) The petition for writ of certiorari was filed herein on June 18, 1954.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254, 62 Stat. 928.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved in this cause are the following provisions of the United States Constitution:

Article 1, Section 8. The Congress shall have power . . .

Clause 12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . .

Clause 14. To make rules for the government and regulation of the land and naval forces.

Amendment 5: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Amendment 6: In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Uniform Code of Military Justice, 64 Stat. 107-145; 50 U.S.C.A. § 551 *et seq.*, provides in pertinent part:

> Article 3(a): Subject to the provisions of Article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status. (64 Stat. 109, 50 U.S.C.A. § 553(a)).
>
> Article 7:
>
> (a) Apprehension is the taking into custody of a person.
>
> (b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this code or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it. (64 Stat. 111, 50 U.S.C.A. § 561).
>
> Article 9:
>
> (a) Arrest is the restraint of a person by an order not imposed as a punishment for an offense directing him to remain within certain specified limits. Confinement is the physical restraint of a person.
>
> (c) An officer, a warrant officer or a civilian, subject to this code or to trial thereunder, may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated. (64 Stat. 111, 50 U.S.C.A. § 563(a), 563(c)).

QUESTIONS PRESENTED

1. Whether the Congress may, without violating the Constitution of the United States, provide by legislation that a citizen of the United States who has been honorably discharged from the military service of the United States and who is engaged in a civilian occupation, not in any way connected with the armed forces, may be apprehended in Pennsylvania, arrested, confined, transported without a civil hearing of any kind to Korea and be there detained for purposes of court-martial on the order of the Secretary of the Air Force charging such civilian with a crime allegedly committed during his prior military service.

2. Does not the Congress lack the power and authority to enact legislation providing for the court-martial of a civilian who has been honorably discharged from military service prior to the institution of court-martial proceedings against him?

3. Did not the Congress by enacting Article 3(a) of the Uniform Code of Military Justice exceed the powers granted it under Article 1, Section 8, Clauses 12 and 14 of the Constitution?

4. Did not the Congress by enacting Article 3(a) of the Uniform Code of Military Justice attempt to provide a system of criminal procedure for civilians different from that required and guaranteed to civilians by the Fifth and Sixth Amendments to the Constitution?

5. Does a *case* "arise in the land or naval forces" within the meaning of the Fifth Amendment to the Constitution when an offense is committed or does it arise only when a legal proceeding is commenced?

6. Did not the Congress in enacting the Uniform Code of Military Justice fail to provide the necessary procedural machinery for the apprehension, arrest, detention and confinement of civilians whom it attempted to make amenable to military trial?

STATEMENT OF THE CASE

Robert W. Toth[1], on whose behalf the petition for writ of *habeas corpus* was filed in the district court below, was honorably discharged from the United States Air Force on December 8, 1952. (R. 1-2) Prior to his discharge he had served in Korea.

On April 8, 1953, an officer of the United States Air Force, Far East Air Logistic Command, signed court-martial charges under oath charging said Robert W. Toth a "civilian, formerly Airman First Class" with the murder in Korea of a Korean national and with conspiracy to commmit murder against the same Korean national. It was charged that the alleged offenses were committed on or about September 27, 1952. (R. 15-17) Thereafter, on April 30, 1953 the then Acting Secretary of the Air Force consented to and directed the apprehension of Mr. Toth by the Air Provost Marshall and directed the Air Provost Marshall to "cause him (Toth) to be delivered forthwith to the Commanding General, Fifth Air Force, to answer the said court-martial charges". (R. 20)

Thereafter, on May 13, 1953, Robert W. Toth was arrested at his place of employment in Pittsburgh, Pennsylvania, by military authorities and, without being afforded a hearing of any type, was flown to Korea to face possible trial on the court-martial charges. (R. 2) Despite the fact that the military authorities were familiar with where he lived (R. 20), no effort was made to arrest or apprehend him at his home.[2]

Subsequent to his arrival in Korea on May 27, 1953, a Petition for Writ of Habeas Corpus was filed on behalf of said Robert W. Toth by his sister, Audrey M. Toth.

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[1] The action was instituted on behalf of Robert W. Toth on the relationship of Audrey M. Toth, his sister.

[2] The complete record before the district court, which is on file in this Court, contains affidavits which show the extensive nature of the plans of the military to effectuate the arrest at Mr. Toth's place of employment. (Tr. 219-223)

(R. 1) Harold E. Talbott was named as respondent in said petition in his capacity as Secretary of the United States Air Force in that said respondent was illegally restraining, detaining and depriving said Robert W. Toth of his liberty. (R. 1) In said petition it was averred, *inter alia*, that the seizure and arrest of Toth constituted a denial of his rights of procedural due process, guaranteed him as a citizen of the United States under the Fourth and Fifth Amendments of the Constitution; that he was likewise deprived of the right guaranteed him by Rules 5 and 40 of the Federal Rules of Criminal Procedure; that Section 3(a) of the Uniform Code of Military Justice, insofar as it applied to Toth, was unconstitutional and void as being contrary to the Fourth and Fifth Amendments and as being vague and indefinite; and that Robert W. Toth as a citizen was not amenable within the framework of the Constitution to military seizure, arrest and trial by court-martial. (R. 1-6)

On the same day (May 27, 1953) a rule directing respondent to show cause was issued. (R. 7) Thereafter on June 25, 1953, after hearing, Judge Holtzoff of the district court ordered that writ of *habeas corpus* issue. (R. 24) In its opinion the district court stated:

> "This subject is a very serious one, as the Court sees it. One of the foundation stones of our Republic is that the civil power shall at all times be superior to the military power. It is a grave matter for military police to arrest a civilian and remove him for trial forthwith, without a hearing, to a distant point in this country or to a foreign country, as is the case in this instance, when there is no provision in any statute authorizing this to be done." (R. 23)

Upon motion of respondent Talbott the effectiveness of this order for issuance of the writ of habeas corpus was stayed pending appeal. (R. 25-26) This appeal was subsequently dismissed by the United States Court of Appeals for the District of Columbia Circuit on the grounds that

the order appealed from was not final or otherwise appealable. (R. 27-28)

After additional proceedings in the district court, which are not germane to the issues presented here, the cause came on for hearing upon return of the writ on September 3, 1953. After full hearing the district court sustained the writ and ordered the discharge of the prisoner Robert W. Toth from custody. (R. 33)[3] In its opinion the district court deemed it premature to pass upon the constitutionality of Section 3(a) of the Uniform Code of Military Justice, but held that there was no statutory provision in the Uniform Code providing for the arrest and transportation of a civilian by the military. (*Toth* v. *Talbott*, 114 F. Supp. 468; R. 30-33).

From this order discharging Toth from custody the Secretary of the Air Force appealed. (R. 35) The order of release was stayed by the district court pending appeal and Toth was released from custody under bond of $1,000.00 (R. 34).[4]

On March 25, 1954 the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered reversing the judgment of the district court. (R. 51) By its judgment the Court of Appeals ordered the cause remanded to the district court "with instructions to discharge the writ and to return Toth to the custody of the military authorities". (R. 50) The opinion of the Court of Appeals (R. 37-50) is reported at 215 F. 2d 22.

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[3] The full text of this order was inadvertently omitted from the printed record filed herein. It is, however, set forth in the original record filed herein (Tr. 224) and for convenience has been set forth as an appendix to this brief at page 47.

[4] It is to be noted that at the time the appeal bond was set by the trial court, counsel for the respondent outlined in strongest terms the Air Force's case against Toth. This case was characterized by the trial court as constituting an assault (a misdemeanor) rather than murder as charged. (Tr. 72)

SUMMARY OF ARGUMENT

At the time court-martial proceedings were instituted against him, Robert W. Toth was a civilian. All connection which he previously had with the United States Air Force had been severed by his honorable discharge from service. He was and is not in military status and no court-martial can have jurisdiction over him. *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331; *In re Grimley*, 137 U.S. 147.

The *sine qua non* to court-martial jurisdiction is that the accused must have the status of a soldier or sailor, *Ex parte Milligan*, 4 Wall. 2. Congress cannot by legislative fiat make the civilian a soldier for the sole purpose of military punishment. Winthrop. *Military Law and Precedents*, (2d Ed. 1906) 106.

Under the powers granted to Congress in Article 1, Section 8 of the Constitution, Congress has no authority to enact legislation providing for the court-martial of a civilian. Congress has the power and authority "to make rules for the government of the land and naval forces" and the plain meaning of that language is that whatever court-martial procedures or proceedings which are enacted by Congress can be made applicable only to those who are actually in military service. The armies which Congress is empowered to raise and govern are comprised of bodies or numbers of men who are "bound to obey military orders and to perform military duty . . ., entitled to military pay and remaining under military discipline and government till discharged in due form or otherwise legally separated from the military state." Winthrop, *Military Law and Precedents, supra*, p. 106.

By specific legislation Congress has made provision for the *number* of men who comprise the United States Air Force (64 Stat. 323, 10 U.S.C. § 20s, suspended by Act of Aug. 3, 1950, c. 537, 64 Stat. 408, as amended by 65 Stat. 88) and has likewise defined the constituent elements of the Air Force. (10 U.S.C. § 1831). Insofar as the Air

Force is concerned, Congress has power under Article 1, Section 8 of the Constitution to provide for the government and regulation only of this group of men. Any effort on the part of Congress to make military rules for the punishment of one who is not a member of or a part of those forces is an usurpation of the authority granted to Congress. There is a complete failure of jurisdiction in the Air Force to court-martial a civilian who is not connected in any way with the forces or groups of men who comprise that branch of the service.

The personal guarantees of liberty embodied in the Fifth and Sixth Amendments form a complete bar to any effort on the part of Congress to provide for the trial of a civilian under military law. Congress cannot enact any valid legislation which would deprive a civilian citizen of the basic rights guaranteed by the Fifth and Sixth Amendments.

The phrase "except in cases arising in the land or naval forces" contained in the Fifth Amendment does not obviate the necessity of indictment by grand jury as guaranteed by that Amendment unless the accusation, charge or court-martial proceeding was commenced while the accused was actually in military service. This is clear from the history of that excepting clause, from the meaning which has been given to the word *case* as used elsewhere in the Constitution, and from the cases in which the phrase has been interpreted and applied.

The Fifth Amendment is the result of the fears of the citizens of the thirteen original states that federal despotism or military dictatorship would stifle the personal liberties for which they had fought the Revolutionary War. Examination of the propositions which were submitted by the State Constitutional Conventions of Massachusetts, New Hampshire, New York and North Carolina, among others, and which ultimately resulted in the Fifth Amendment, make it clear that the citizens of those states desired it to be a part of the supreme law of the land that their civilian citizens would be forever protected against

military accusations, trial and punishment. This Court has had occasion to consider the meaning of the word "cases" as used in Article 3, Section 2 of the Constitution, and has held that a case arises within the meaning of that section when the subject is submitted to the court by a party who asserts his rights in the form prescribed by law. *Osborn* v. *Bank of the United States*, 9 Wheat (22 U.S.) 738, 819. In the case of *Re Pacific R. Commission*, 32 Fed. 241, 255, Mr. Justice Fields stated:

> "Whenever the claim of a party under the Constitution, laws or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case."

In a criminal proceeding, a case never arises until the accusation or charge has been made. *Counselman* v. *Hitchcock*, 142 U.S. 547; *United States* v. *Patterson*, 150 U.S. 65, 68.

To hold otherwise than that a "*case arises*", within the meaning of the excepting clause of the Fifth Amendment, when the criminal charge, accusation or proceeding is instituted or commenced would be to hold the guarantees of personal liberty contained in that Amendment nugatory and valueless, and would do violence to the meaning which has previously been given to an identical phrase in other cases decided by this Court.

Lower federal courts, following the case of *In re Bogart*, 3 Fed. Cas. 796 (C.C.D. Calif. 1873), have held that the word "*cases*" as used in the excepting clause of the Fifth Amendment is synonymous with the word "*events*". Other courts have followed the reasoning that a case does not arise until a charge is filed or a legal proceeding is instituted. *Ex parte Wilson*, 33 F. (2d) 214 (D.C.E.D. Va. 1929); *U. S. ex rel. Flannery* v. *Commanding General*, 69 F. Supp. 661 (D.C.S.D.N.Y. 1946).

The holding of the court of appeals below that "although a crime does not become a case, i.e., a legal proceeding, until a charge is made, a case *arises* when the crime is

committed'' strips the protections of the Fifth Amendment of their strength and vigor. Likewise the analogy which that court used to support the proposition is inapposite.

The cases which have upheld the constitutionality of the Act of March 2, 1863 (12 Stat. 696) and more particularly the case of *In re Bogart*, 3 Fed. Cas. 796, which is cited as the leading case on the subject, are not sound authority, for the basic premise on which such cases depend is that the word *cases* as used in the excepting clause means nothing more than *events*. Examination of the *Bogart* decision shows that the court took a dictionary definition for the meaning of *cases* and held such definition to be its meaning in the legal and constitutional sense. The decision in the *Bogart* case is irreconcilable with the decision of this Court in *Ex parte Milligan*, 7 U.S. 2, 123. More efficacious as authority than *Bogart* is *Ex parte Henderson*, 11 Fed. Cas. 1067, wherein it was determined that any attempt on the part of Congress to provide for the court-martial of any person not actually in the land or naval forces was unconstitutional.

The personal liberties guaranteed by the Fifth and Sixth Amendments are indefeasible liberties and this Court has held that no legislation could validly be enacted which would deprive the civilian citizen of such rights. *Ex parte Milligan, supra.* In this case, however, the United States Air Force acting under title and authority of Article 3(a) of the Uniform Code of Military Justice has deprived or sought to deprive Robert W. Toth of his right to be free from unreasonable seizure, of his right to bail, of his right to indictment by a grand jury, of his right to trial by jury, of his right to subpoena witnesses, of his right to a prompt preliminary hearing, and of his right to counsel of his own choosing.

In the case of *Wong Wing* v. *United States*, 163 U.S. 228, this Court had occasion to strike down as unconstitutional a statute which provided for the summary punishment of aliens. This Court held that the guarantees of

the Fifth and Sixth Amendments applied to all persons within the United States and "that even aliens shall not be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . .".

If it be assumed that Congress could, within the framework of the Constitution, enact valid legislation making civilians amenable to military trial and punishment, there is a fatal jurisdictional defect in the Uniform Code of Military Justice in that no provision is made therein for the apprehension, arrest, detention or confinement of civilians. The Uniform Code of Military Justice provides a *casus omissus* in that the military authorities are nowhere given the authority to arrest or apprehend the civilian, or to confine or physically restrain him of his freedom.

Article 3(a) merely details that the discharged service men is not relieved from amenability to trial by courts-martial notwithstanding the fact that the military status is terminated. But this detailing of "amenability" to military trial does not confer jurisdiction to try.

Article 9(a) of the Code provides that "confinement is the physical restraint of a person". Article 9(c) provides that "a civilian subject to this code . . . may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject . . .". The term "commanding officer" has a specific meaning by virtue of the regulations issued pursuant to authority granted by the code and includes within its terms only military persons. *The Manual For Courts-Martial, United States, 1951*, § 21 (a). Toth had no commanding officer at the time charges were placed against him. He was a civilian in the full sense of the word and there was no one who could order his court-martial.

The authority granted under Article 7(b) of the Uniform Code which permits military police to take into custody persons subject to the Code is nothing more than

an authorization to the military to effectuate the same type of arrests that civilian peace officers can lawfully accomplish when acting without a warrant. It is made clear from the Regulations issued pursuant to the Code that the authority to apprehend granted in Article 7 does not carry with it the authority to *confine*. *Manual for Courts-Martial, United States, 1951*, § 19(d).

If it is assumed that the Air Force had power to apprehend Toth by virtue of Article 7(b), once his apprehension was effected the power of the Air Force was exhausted. Under the Regulations there was no commanding officer who could order Toth's confinement, there was no commanding officer to whose authority he could be delivered.

Equally important, however, is that under the plain language of the Code an honorably discharged civilian was not a "person subject to the code" who could be apprehended by military authorities under Article 7(b). Article 2 of the Code enumerates twelve categories of persons who are subject to the Code. A person having the same status as Toth does not fall within any of these categories and Toth is clearly not a person who can be apprehended by military police.

The issue which is presented for determination by this Court is not the guilt or innocence of one civilian. The issue is whether Congress, under the Constitution, can deprive the civilian citizen of this Country of those sacred, inalienable rights guaranteed in the Fifth and Sixth Amendments. This Court has held it to be "the birthright of every American citizen when charged with crime, to be tried and punished according to law." *Ex parte Milligan*, 71 U.S. 2, 118.

Careful examination of the Uniform Code of Military Justice shows that the intent of Congress in enacting Article 3(a) has already been defeated. It is clear that Congress intended to cover only serious crimes involving maximum punishments of five or more years confinement.

But in reality even the most petty offenses are now within the ambit of the amenability provision of Article 3(a). Under Article 56 the President is empowered to prescribe maximum punishments for offenses listed under the code and by Executive Order 10247, dated May 29, 1951, punishment for certain offenses was suspended with the result that a discharged serviceman would be subject to court-marital for such petty military offenses as being Absent Without Leave for one day or Missing Movement.

ARGUMENT

I. CONGRESS HAS NO POWER UNDER THE CONSTITUTION TO ENACT LEGISLATION PROVIDING FOR THE COURT-MARTIAL OF A CIVILIAN.

A. Congress Cannot by Legislative Fiat Make One, Who Has No Connection With the Military Forces, a Soldier for the Sole Purpose of Military Trial and Punishment

Petitioner's case is bottomed on the fact that Robert W. Toth at all times pertinent to the inquiry herein was a civilian. He was honorably discharged from the United States Air Force on December 8, 1952 (R. 1-7, 15) and on that date resumed his status as a civilian citizen of the United States.

From December 8, 1952 his connection with the Air Force or with military authority was entirely and completely severed. He was not a member of the reserves; he had no commanding officer; he received no military pay or allowances; he was not subject to military control or discipline of any type; he had no military obligations or duties and could be the recipient of no benefits from the military; indeed his wearing of an Air Force uniform would have subjected him to criminal prosecution and punishment, 18 U.S.C. § 702; *Gaston* v. *United States*, 79 U.S. App. D.C. 37, 143 F. 2d 10, cert. denied 322 U.S. 764.

He was a civilian living at his home in Pittsburgh, Pennsylvania, engaged in earning his livelihood in a strictly civilian occupation when court-martial charges were filed against him on April 8, 1953. (R. 15) And he was

a civilian all the while he was held in custody by the military authorities from May 13, 1953 until his release from custody was ordered by the district court below on September 3, 1953. (R. 30)

It is petitioner's contention that perforce this civilian status of Toth there is a complete failure of jurisdiction in the Air Force to arrest or apprehend him, to hold him in custody, or to seek to try him by court-martial. In the case of *In re Grimley* (*United States* v. *Grimley*), 137 U.S. 147 this Court held that one who had the status of a soldier was subject to court-martial; one not in such status is not subject to military discipline; and that it is a proper function for the civil courts to ascertain by means of the writ of *habeas corpus* whether or not the court-martial has jurisdiction. Likewise in that case and in the case of *Morrissey* v. *Perry*, 137 U.S. 157, this Court explicitly held that military service effected a change in status and, in the *Grimley* case, compared it to the change of status which is effected by marriage.

Prior to the enactment of Article 3(a) of the Uniform Code of Military Justice on May 5, 1950, this Court had repeatedly held that only persons in the military status were amenable to trial by court-martial, or, to put it differently, that a court-martial had jurisdiction only over persons in military status. As early as 1806 in the case of *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331, Chief Justice Marshall, speaking for the court, held that a court-martial had absolutely no jurisdiction over a person not in the militia and that the court-martial and officers who attempted to exercise such jurisdiction were trespassers. In *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165, 173, it was held that where "a court-martial proceeds and sentences a person *not in the military or naval service*" (emphasis added) the act is not merely voidable but void and the whole proceeding a nullity for failure of jurisdiction over the subject matter. This principle was reiterated in *Stoll* v. *Gottlieb*, 305 U.S. 165, 176.

It would appear that in all cases involving courts-martial decided by this Court, with the exception of *Wise* v. *Withers, supra; Ex parte Milligan,* 4 Wall. 2, and *Hirshberg* v. *Cooke,* 336 U.S. 210, the accused's actual status as a soldier, the *sine qua non* to court-martial jurisdiction, was not in issue. The case of *Ex parte Wilson,* 33 F. (2d) 214 is illustrative of this jurisdictional proposition, for in that case it was held that the act of the President in dropping a naval ensign from the rolls of the Navy for leaving his post without leave made such person a civilian, and that because of his civilian status a naval court-martial had no jurisdiction over him.

By Article 3(a) of the Uniform Code of Military Justice Congress enacted that ". . . . .any person charged with having committed, while in a status in which he was subject to this code, an offense against this code . . . shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status". (64 Stat. 109, 50 U.S.C. § 553(a)). In speaking of this article the court of appeals below held: "In effect this section of the Uniform Code is no more than a provision by Congress that an honorable discharge from military service shall not be an absolution for crimes theretofore committed." (R. 40) In this holding the court of appeals completely missed the point at issue. It made no distinction between "absolution" and "amenability to trial". There is a recognized difference between jurisdiction over the offense and jurisdiction over the person. Congress cannot give a court-martial jurisdiction over the person of a civilian. Congress cannot by legislative fiat turn a civilian into a soldier for the sole purpose of summarily punishing him.

It is a truism that one who has the status of a soldier has certain rights, duties and obligations different from those of a civilian, *Reaves* v. *Ainsworth,* 219 U.S. 296; *Ex parte Mason,* 105 U.S. 696; *Burns* v. *Wilson,* 346 U.S. 137. Congress cannot legislate a hybrid status (Winthrop,

Military Law and Precedents, (2d ed. 1920) 106); Congress cannot deprive the civilian *nolens volens* of his rights as a civilian and subject him to the rigors of military law and discipline. For example, this Court has said: "To those in the military or naval service of the United States, the military law is due process." *Reaves* v. *Ainsworth, supra*, at 304. In the field of federal criminal law the accused civilian has certain guaranteed basic rights, such as, for example, the right to be free from unreasonable seizure, the right to indictment by a grand jury, the right to trial by jury, the right to bail, the right to subpoena witnesses, the right to a *prompt* preliminary hearing, the right to counsel of his own choosing. *Vide: Rule 5 and Rule 40, Federal Rules of Criminal Procedure.* These rights are not guaranteed the military person who is subject to military regulation and discipline.

B. Congress Lacks the Power to Enact Valid Legislation Providing for the Court-Martial and Trial of Civilians Who Are Not Connected in Any Way With the Military Forces

Whatever positive authority the Congress has to enact legislation providing for courts-martial is contained in Article 1, Section 8 of the Constitution. Two separate clauses in that Section set forth the scope of Congressional power and authority. The pertinent provisions are:

> "Section 8. The Congress shall have power . . .
>
> 12. To raise and support armies, but no appropriation of money to that use shall be for a longer period than two years; . . .
>
> 14. To make rules for the government and regulation of the land and naval forces."

It is the position of the petitioner that these constitutional provisions and grants in no wise empower the Congress to enact legislation which could validly encompass the court-martial of a civilian. The validity of this position should be apparent from the plain meaning of the

language used in the constitutional grant of power. A study of the background of those constitutional provisions supports that plain meaning of the language.

It is clear, beyond argument, that men who had shaken off a tyrant's yoke, who were bitterly and angrily familiar with the overweening despotism of the tyrant's arms and the unconscionable use of the despised and feared Writs of Assistance would not seek to foster the very tyranny and oppression they had fought against in another name. The Declaration of Independence contains the following grievances and complaints against the British Crown:

> "He has affected to render the Military independent of and superior to the Civil power . . .
>
> "For depriving us in many cases of the benefits of trial by Jury . . .
>
> "For transporting us beyond Seas to be tried for pretended offenses . . . "

In declaring their independence the Colonists were at one and the same time espousing the philosophy of government that the civil power is at all times paramount and superior to the military power.

Prior even to the Declaration of Independence in the history of Anglo-Saxon liberty was the English Bill of Rights obtained in 1689 by a people who had suffered too long under the yoke of the burdensome power and oppression of large standing armies. The Mutiny Acts of England (1689 through 1789) passed each year recited that standing armies were illegal except by act of Parliament. In each Mutiny Act, in addition to the provisions for the appropriation of money for the armed force necessary for the coming year, regulations were made, separate from the civil law, for the discipline of the forces and for the prevention and punishment of mutiny. See *Kurtz* v. *Moffitt*, 115 U.S. 487, 498 *et seq.*

In Article 1, Clause 8 Congress is given the power to "raise and support armies" with the exception therein contained as to the appropriation of money for that use. The purpose of the section expresses the clear intent to prevent the establishment of a military oligarchy through the device of a large standing army. It reflects the opposition in the Constitutional Convention to large armed forces and the attendant usurpation of liberty which would swell therefrom. *The Federalist No. 41* (Madison); *The Federalist No. 8* (Hamilton).

The *armies* which the Congress is empowered to raise and support are comprised of bodies or numbers of men. *Armies* or *Army* have been repeatedly interpreted in a series of statutes dating back to the adoption of the Constitution. The constituent elements are "a certain number of officers commissioned or appointed, and of soldiers enlisted, into the military service as such, bound to obey military orders and to perform military duty in peace or war, entitled to military pay and remaining under military discipline and government till discharged in due form, or otherwise legally separated from the military state." Winthrop, *Military Law and Precedents*, (2d Ed. 1920) p. 106. The Congress has specifically enacted legislation governing the *number* of men who comprise the United States Air Force. Act of June 10, 1950, c. 454, 64 Stat. 323, 10 U.S.C. § 208 (suspended by Act Aug. 3, 1950, c. 537, 64 Stat. 408, as amended June 19, 1951, c. 144, 65 Stat. 88). It has likewise provided that:

> "The United States Air Force shall consist of the Regular Air Force, the Air Force Reserve, the Air National Guard of the United States and the Air National Guard which is in the service of the United States; and shall include persons inducted, enlisted, or appointed without specification of component in the Air Force and all persons serving in the Air Force under call or conscription under any provision of law, including members of the Air National Guard of the several States, Territories and the District of Colum-

bia when in the service of the United States pursuant to call as provided by law." Act Sept. 19, 1951, c. 407, 65 Stat. 329, 10 U.S.C. § 1831.

It is this group of men, insofar as applicable to the Air Force, for the government and regulation of which the Congress has the power to make rules under Clause 14 of Article 1, Section 8. It is the *force* of men, the *group* of men, the *number* of men for whose government and regulation Congress has power to make military rules. There is no constitutional power in the Congress to make military rules for punishment of one who is not a member of or a part of these *forces*. At the time charges were placed against him, Toth was a civilian. He was not a member of the Air Force. He was not a member of the Regular Air Force, or of the Air Force Reserve, or of the Air National Guard of the United States, or the Air National Guard of any state in the service of the United States, at the time the Air Force attempted to subject him to the discipline which legally could be applicable only to persons comprised under those groups or *forces* of men.

Colonel Winthrop succinctly defined the personal amenability of the military person to military jurisdiction as follows:

> "It is the *general rule* that the person is amenable to the military jurisdiction only during the period of his service as an officer or soldier. Thus, in the case of an *officer*, the jurisdiction commences with the acceptance of his appointment or commission, or, where originally appointed by State authority, with his muster, (or re-appointment) into the service of the United States and ends with his death, the acceptance of his resignation, his dismissal, etc., or—if a volunteer officer—his discharge or mustering out, etc. In the case of a *soldier*, it begins with his enlistment or muster into the service and ends with his discharge or muster-out. In other words, the general rule is that *military persons*—officer and enlisted men—are subject to the military jurisdiction, so long only as they remain such; that when, in any of the recog-

nized legal modes of separation from the service, they cease to be military and become *civil persons*, such jurisdiction can, constitutionally, no more be exercised over them than it could before they originally entered the army, or than it can over any other members of the civil community." *Military Law and Precedents*, (2d Ed. 1920) at p. 89.

The Court of Appeals below in discussing Article 3(a) of the Uniform Code of Military Justice (64 Stat. 109, 50 U.S.C.A. § 553(a)) in the light of the power granted Congress to make "rules for the government and regulation of the land and naval forces stated: "In effect this section of the Uniform Code is no more than a provision by Congress that an honorable discharge from military service shall not be an absolution for crimes theretofore committed." (R. 40). Petitioner is not seeking a judicial ruling that honorable discharge is an absolution for crime. If Congress should so desire, valid legislation could be enacted making honorably discharged servicemen amenable to trial in civil courts for crimes committed while in service. See: Meyers and Kaplan, *Crime Without Punishment*, 35 Georgetown Law Journal, 303, 327. Such legislation to be valid would have to recognize the difference between those who have the status of a civilian and those who have the status of a military person and insure to the civilian his guaranteed, basic Constitutional rights and liberties.

C. The Power of Congress to Enact Legislation Providing for the Court-Martial of a Civilian is Expressly and Completely Barred by the Fifth and Sixth Amendments

Irrespective of the complete lack of legislative power in the Congress, as set forth in Article 1 of the Constitution, to enact valid legislation providing for the trial of a civilian under military law and process, the personal guarantees of the Fifth and Sixth Amendments completely bar any effort which the Congress might make to assume such power. Article 3(a) of the Uniform Code is illegal and constitutionally void because its result in this case is to de-

prive a civilian of the right to indictment by a grand jury, the right to trial by jury, the right to bail, the right to subpoena witnesses and the right to counsel of his own choosing. These rights are indefeasible rights; expressly guaranteed by the supreme law of the land to every *civilian* accused of a crime.

Article 3(a) is invalid, insofar as Toth is concerned, because, by attempting to subject him to trial by court-martial, it would deprive him of his guaranteed basic rights as a civilian under the Constitution. It has long been recognized by this Court that the rights which are afforded an accused in military law are not fundamental constitutional rights but are only such rights as Congress has provided by statute. *Dynes* v. *Hoover*, 20 How. 65; *Ex parte Mason*, 105 U.S. 696; *Reaves* v. *Ainsworth*, 219 U.S. 296. As recently as 1953, this Court reiterated that due process of law in the military differed in material respects from due process in the civil sphere. *Burns* v. *Wilson*, 346 U.S. 139.

In pertinent part, the Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces . . .".

Toth is charged with the commission of federal offenses which are capital or otherwise infamous crimes (that is, he is charged with murder in violation of Article 118 of the Uniform Code of Military Justice, 50 U.S.C. § 712, and with conspiracy to commit murder in violation of Article 81, 50 U.S.C. § 675 (R. 19)), and he is therefore entitled as of right to be proceeded against by way of indictment or presentment of a grand jury unless the charge falls within the class of cases contemplated by the phrase "arising in the land or naval forces". Unless the charge is one of that class, Congress is without power to dispense with the requirement of a presentment or indictment and Toth is entitled to all the civil benefits and guarantee of liberties set forth in the Sixth Amendment.

The phrase "except in cases arising in the land or naval forces" is clearly inapplicable to this case which arose by way of a charge instituted after Toth's connection with the military service had been severed by honorable discharge. The excepting phrase is limited on its face to those cases arising in the land or naval forces. The critical question in interpreting the phrase is: When does a *case* arise? The history of the excepting clause, the meaning of the word *case* as used elsewhere in the constitution and the cases in which the phrase has been interpreted and applied all point to the conclusion that there is no *case* until there is an accusation, charge or legal proceeding.

1. The History of the Excepting Clause of the Fifth Amendment

The excepting clause found its origin in two objectives nurtured by the citizens of the thirteen original states, namely, the desire to protect, against Federal despotism, the individual personal liberties for which they had successfully fought the Revolutionary War and the fear of a possible military dictatorship. This Court has frequently taken note of those objectives. In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 at 120, this Court stated:

> "And so strong was the sense of the country of their importance, and so jealous were the people; that these rights, highly prized, might be denied them by implication that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would have been so amended as to embrace them, it would never have been ratified."

Examination of the propositions which were submitted by the various states as amendments to the original Constitution demonstrate clearly the intention that indictment by grand jury was to be preserved inviolate in the civilian population and that military justice or court-martial was applicable to the soldier only when he was *actually* in the service.

Under date of February 6, 1788, the convention of the delegates of Massachusetts in the very act of ratifying the Constitution submitted some nine amendments in the following language:

> "And as it is the opinion of this Convention that certain amendments & alterations in said Constitution would remove the fears & quiet the apprehensions of many of the good people of this Commonwealth & more effectually guard against an undue administration of the Federal Government, The Convention do therefore recommend that the following alterations & provisions be introduced in the said Constitution.
>
> . . . . . .
>
> "*Sixthly*, that no person shall be tried for any Crime by which he may incur an infamous punishment or loss of life until he be first indicted by a Grand Jury, except in such cases as may arise in the Government & regulation of the Land & Naval forces." *Documentary History of the Constitution of the United States of America*, Vol II, pp. 93-95 (Department of State, 1894).

Under date of June 21, 1788, New Hampshire in ratifying the Constitution submitted the identical provision as a proposed amendment. *Ibid*, pp. 141-143.

The language of these two proposed alterations or amendments make it quite clear that it was the intendment of the people of Massachusetts and New Hampshire that military justice could be dispensed only to those actually in the military service. Exception to indictment by grand jury applies only to "such cases as may arise in the *government* and *regulation* of the land and naval forces". *Government* of the land forces can only apply to persons actually in such forces. If a person is not in such forces, he is not a person so to be governed; he is not a part of the government of the forces; and only by violently twisting the plain meaning of the language used could it ever be argued that the intention was that all persons who were ever in such forces would be deprived of the personal right of indictment by grand jury. The people of Massa-

chusetts and New Hampshire desired it to be made a part of the supreme law of the land that their civilian citizens would be forever protected from military accusation, trial and punishment.

The constitutional convention of New York, under date of July 26, 1788, in ratifying the original constitution submitted *inter alia* the following proposed amendments and declarations:

"...

That standing Armies in time of Peace are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that at all times, the Military should be under strict Subordination to the Civil Power. ...

That (except in the Government of the Land and Naval Forces, and of the Militia when in actual Service, and in cases of Impeachment) a Presentment or Indictment by a Grand Jury ought to be observed as a necessary preliminary to the trial of all Crimes cognizable by the Judiciary of the United States, and such Trial should be speedy, public and by an impartial Jury of the County where the Crime was committed; and that no person can be found Guilty without the unanimous consent of such jury.[5] ..." *Documentary History of the Constitution of the United States of America, supra*, pp. 191-192.

[5] This proposed Article continues: "But in cases of Crimes not committed within any County of any of the United States, and in Cases of Crimes committed within any County in which a general Insurrection may prevail, or which may be in the possession of a foreign Enemy, the enquiry and trial may be in such County as the Congress shall by Law direct; which County in the two Cases last mentioned should be as near as conveniently may be to that County in which the Crime may have been committed. And that in all Criminal Prosecutions, the Accused ought to be informed of the cause and nature of his Accusation, to be confronted with his accusers and the Witnesses against him, to have the means of producing his Witnesses, and the assistance of Council for his defense, and should not be compelled to give Evidence against himself."

The parenthetical exception contained in the proposed New York amendment quoted above is illuminative of the thought of the framers of the Constitution. Three situations are excepted from the guarantee of indictment by grand jury, namely: (1) government of the land and naval forces, (2) the militia when in actual service, and (3) cases of impeachment. All three situations imply a status. There can be no impeachment unless there is an incumbent in a position (or status) from which he can be impeached. A judge can only be impeached while he is a judge. He cannot be impeached when he has left that position, for the very object of impeachment is removal from office. So, also the member of the militia "when in actual service" is denied the right to indictment by grand jury and the status of such a person is clear beyond cavil or argument.

There is set forth in the margin one of the proposed amendments of the ratifying convention of North Carolina[6] submitted August 1, 1788, which again recites that the exception is applicable only "in the government of the land and naval forces".

Even more clearly than the intendment of the founding fathers as expressed above, the language used in the Fifth Amendment demonstrates that no civilian citizen can be deprived of the personal guaranty of indictment by grand jury (and the concomitant right of trial by jury) by any legislative enactment. It must be borne in mind that the Fifth Amendment involves the protection of personal liberties and as this Court has said:

> "There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired

[6] "8th. That in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence and be allowed counsel in his favor, and to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty (except in the government of the land and naval forces) nor can he be compelled to give evidence against himself." *Documentary History of the Constitution of the United States of America, supra*, p. 267.

> those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied." *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 178.

It must likewise be borne in mind that the respondent is endeavoring to bring the proposition presented within the exception to the protected rights which flow to every citizen. This exception is premised on a tortured meaning which is ascribed to "cases arising in the land or naval forces".

2. The Meaning of the Word "Case" as Used Elsewhere in the Constitution

Section 2 of Article 3 of the Constitution states that "the judicial power shall extend to all *cases*, in law and equity, *arising* under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . ." (emphasis supplied) In speaking for this Court, with specific reference to this clause, Chief Justice Marshall stated:

> "This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States." *Osborn* v. *Bank of the United States*, 9 Wheat. 738 at 819.

In the leading case of *Re Pacific R. Commission*, 32 Fed. 241, 255, Mr. Justice Fields defined "case" in these words:

"The judicial Article of the Constitution mentions cases and controversies. The term 'controversies' if distinguishable at all from 'cases' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm* v. *Georgia*, 2 Dall. 431, 432. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication." *Re Pacific R. Commission*, 32 Fed. 241, 255.

These definitions have been adhered to by this Court in *Muskrat* v. *United States*, 219 U.S. 346, 356 and *Aetna Life Insurance Company* v. *Haworth*, 300 U.S. 227, among others. Justice Fields' and Chief Justice Marshall's definitions, which have never been overruled or dissented from in this Court, encompass both civil and criminal *cases*. Likewise they encompass the meaning of the question in issue, i.e., when does a *case arise*? In a criminal case the claim of a party who has a wrong to be punished or a claim to be redressed never takes such form that the "judicial power is capable of acting upon it" until an accusation or charge has been made. Under this definition a *case* can only *arise* in the land or naval forces when an accusation has been made or the criminal charge filed against the soldier. It is the filing of the accusation, the making of the charge which makes the *case*.

It is interesting to note that in the case of *Counselman* v. *Hitchcock*, 142 U.S. 547, 563, the Government took the position before this Court that a "criminal case" as used in the self-incrimination clause of the Fifth Amendment "could arise only when an indictment should be returned".

This Court, following the philosophy previously announced in *Ex parte Lange, supra,* that constitutional guarantees should always be interpreted liberally in favor of an accused, held:

> "A criminal prosecution under Article 6 of the amendments is much narrower than a 'criminal case', under Article 5 of the amendments. It is entirely consistent with the language of Article 5, that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury." 142 U.S. 547, 563.

It is clear that this Court did not intend to depart from the meaning of the word "case" previously adopted. This was made evident when in the year following its decision in *Counselman* v. *Hitchcock*, this Court decided *United States* v. *Patterson*, 150 U.S. 65, and in that latter case stated:

> "A criminal charge, strictly speaking, exists only when a formal written complaint has been made against the accused and a prosecution initiated. It is true the popular understanding of the term is "accusation", and it is freely used with reference to all accusations, whether oral, in the newspapers, or otherwise; but in legal phraseology it is properly limited to such accusation as have taken shape in a prosecution. In the eyes of the law a person is charged with a crime only when he is called upon in a legal proceeding to answer to such a charge. Mere investigation by prosecuting officers, or even the inquiry and consideration by examining magistrates of the propriety of initiating a prosecution, do not of themselves create a criminal charge." 150 U.S. 65, 68.

Speaking further of this definition the Court added:

> "There is nothing in the case of *Counselman* v. *Hitchcock*, 142 U.S. 547, which militates against the views herein expressed. In that case a distinction was drawn between the terms 'criminal case' in the 5th Amendment to the Constitution, and 'criminal prose-

> cution' in the 6th Amendment and the former, *for the protection of the citizen*, given a broad construction so as to include investigations before a grand jury. The limitation placed upon the term 'criminal prosecution' coincides with that here given to 'criminal charges'." 150 U.S. at 69. (Emphasis added)

Following this philosophy of interpreting the provisions of the Fifth and Sixth Amendments broadly so as to protect the rights of the citizen, petitioner submits that the word *cases*, as used in the excepting clause of the Fifth Amendment, must be given a narrow meaning. If this philosophy of interpretation is departed from in this case and the word *cases* as used in the excepting clause is held to have a meaning synonymous with *events* the constitutional guarantee of indictment by grand jury would be rendered meaningless and nugatory. Petitioner submits that *cases* as used in the excepting clause has the same meaning which it has when used in the judicial sense, and that its meaning is synonymous with the meaning given the phrase "criminal charge" in *United States* v. *Patterson, supra.*

3. Interpretations Given the Word "Case" as Used in the Excepting Clause of the Fifth Amendment

No decision of this Court has been found defining the word "cases" as used in the excepting clause of the Fifth Amendment. In the lower federal courts there are some decisions holding that the word "cases" is synonymous with the word "events". *In re Bogart*, 3 Fed. Cas. 796 (C.C.D. Calif. 1873); *Ex parte Joly*, 290 Fed. 858 (S.D. N.Y. 1922); *Terry* v. *United States*, 2 F. Supp. 962 (W.D. Wash. 1933); *United States* v. *Hildreth*, 61 F. Supp. 667 (E.D.N.Y. 1945); *Kronberg* v. *Hale*, 180 F.(2d) 128 (C.C.A. 9th, 1950). Other lower federal courts have followed the reasoning that a case does not arise until a charge is filed or a legal proceeding is instituted. See e.g., *Ex parte Wilson*, 33 F.(2d) 214 (D.C.E.D. Va. 1929);

U.S. ex rel. Viscardi v. *MacDonald*, 265 F. 695 (D.C.E.D. N.Y. 1920); *U.S. ex rel Santantonio* v. *Warden*, 265 F. 787 (D.C.E.D.N.Y. 1919); *U.S ex rel Flannery* v. *Commanding General*, 69 F. Supp. 661 (D.C.S.D.N.Y. 1946). This latter is obviously the better view. Certainly few will be found who will follow the mental prestidigitation indulged in by the court of appeals in this case when it said:

> "The Government says a case arises when the crime is committed; hence the Constitution itself excepts the present case from requirement for indictment. It seems to us that, although a crime does not become a case, i.e., a legal proceeding, until a charge is made, a case *arises* when the crime is committed: just as a man is born on the day of his birth, although he is not a man until many years thereafter." (R. 41)

This interpretation of the excepting phrase makes the protection and guarantee of the amendment a nullity. This interpretation is antithetical to the holdings of this Court that the provisions of the Constitution be interpreted in such manner as to give the broadest protection to the rights of the citizen. See, e.g., *Ex parte Lange, supra.* Furthermore the analogy of the appellate court is inapposite and, if it supports anything, supports petitioner's proposition rather than respondent's. For, while it is true that every man is born on the day of his birth, it is equally true that every child does not become a man. The rights which manhood (adulthood) confer are not rights arising at birth; they are rights acquired when manhood is reached. Every child, from date of birth, does not possess an inchoate right to vote or enter into a binding contract, etc.; these rights *arise* in the person when the status of manhood is achieved. So it is also with a *case.* Occurrences or events which give rise to a case always occur prior to the institution of legal proceedings. In the civil law the cause of action accrues, in the criminal law the crime is committed, but no *case* arises until the judicial proceeding is instituted.

It would appear that the court of appeals below in accepting the proposition that a case arises when a crime is committed gave great weight to the fact that this Court had never had occasion to strike down the Act of March 2, 1863 (12 Stat. 696, re-enacted as Article of War 60, Rev. Stat. § 1342 (1878); Article of War 94, 41 Stat. 805 (1920), amended 62 Stat. 640 (1948)), which provided in substance that a person accused of committing fraud against the Government while in the military service would still be amenable to arrest and trial by court-martial for such offense notwithstanding his discharge from service.[7] It would likewise appear that the court below gave great weight to the fact that other federal courts had upheld the validity of this Act. (R. 41-42). The leading case standing for the constitutionality of the Act of March 2, 1863 and the one which is referred to and adopted as precedent in subsequent decisions of the lower federal courts, is that of *In re Bogart*, 3 Fed. Cas. 796 (C.C.D. Calif. 1873). It is in this *Bogart* case that the word "cases", as used in the excepting clause of the Fifth Amendment, is held to mean "events". It is difficult, if not impossible, to reconcile the reasoning of this case with the decision of this Court, in *Ex parte Milligan, supra*, decided some six years before, and with the decision of this Court in *Osborn* v. *Bank of the United States, supra*, wherein the word "cases" had been defined and given a meaning not in any manner compatible or synonymous with "events".

Examination of the *Bogart* case will show that Robert D. Bogart served as a paymaster clerk in the United States Navy and was charged with embezzlement of naval funds. He was sued for civil damages and the statutory penalty of $2000.00 under the third section of the Act of March 2, 1863, in the District Court for the Eastern District of

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[7] Reference to the Senate debate shows that the Act of March 2, 1863, was proposed and passed as a wartime measure and grave doubts were expressed by Senators present as to the Constitutionality of the bill. See *Cong. Globe*, February 14, 1863, 37th Cong. 3d Session, pp. 952-957.

New York. (See: *U.S. ex rel. Marcus v. Hess,* 317 U.S. 537). In that case Bogart interposed the defense that he could not be subject to the civil penalty of $2000.00 because he was a member of the naval service and as such was liable to trial by naval court-martial and this position was sustained by the court. *United States v. Bogart,* 3 Ben. 257, 24 Fed. Cas. 1184 (D.C.E.D.N.Y. May 1869). Subsequently Bogart was arrested in California by naval authority to be held for court-martial on the same charge of embezzlement and on the charge of desertion. Bogart then petitioned the Circuit Court for the District of California for a writ of habeas corpus alleging that naval court-martial had no jurisdiction over him because he had been discharged from the naval service. Upon the return alleging desertion from the service and not discharge as contended by the petitioner, the court held that the court-martial had absolute jurisdiction over him. With respect to the question of discharge, the court likewise held that a person's subsequent discharge from the service will not prevent him from being court-martialed for an offense committed during his prior military service. The court adopted a dictionary definition of the word "cases" as used in the excepting clause of the Fifth Amendment and held that it meant "events". Under the court's reasoning the former military person is always subject to trial by court-martial for any "event" or crime which occurred while he was in service, notwithstanding subsequent discharge prior to the institution of criminal charges or proceedings. *In re Bogart,* 3 Fed. Cas. 796, 800-801 (C.C.D. Calif. 1873). From this broad basis it would necessarily follow that the Act of March 2, 1863 was not violative of the rights guaranteed by the Fifth Amendment insofar as that Act permitted the court-martialing of discharged military personnel for offenses of fraud or embezzlement committed while in service.

In the final analysis the *Bogart* case and those which follow it, stand for nothing more than that the word

"cases" as used in the Fifth Amendment means "events". This is a proposition which has never been followed or adopted by this Court and, as set forth above, is a definition which is completely contrary to the meaning which has been given the word in other sections of the Constitution.

Likewise the decision in the *Bogart* case is irreconcilable with the decision of this Court in *Ex parte Milligan*, wherein it is held:

> "The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of public service is amenable to the jurisdiction which Congress has created for their government, and, *while thus serving*, surrenders his right to be tried by the civil courts. All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance and cannot be frittered away on any plea of state or political necessity." 71 U.S. 2 at p. 123 (1866) (emphasis supplied).

In sharp disagreement with the *Bogart* case is the decision in *Ex parte Henderson*, 11 Fed. Cas. 1067 (C.C.D. Ky. 1878), decided with full knowledge of the *Bogart* opinion. In the *Henderson* case the petitioner (for writ of habeas corpus) was a civilian who was being held for court-martial for alleged fraud arising out of a contract with the government in violation of the Act of March 2, 1863. In discharging the petitioner from custody the court held in dealing specifically with the Act of March 2, 1863 that any attempt on the part of Congress to provide for

the court-martial of any person not actually in the land or naval forces was unconstitutional. 11 Fed. Cas. 1067, 1075 *et seq.*

With the exception of the *Bogart* case and the few cases cited above which follow it, it has been almost axiomatic in the view of the courts, including this Court, that only those persons who are actually in service are amenable to military trial and justice. In *Reaves* v. *Ainsworth*, 219 U.S. 296 at 304 it was stated: "To those *in* the military or naval service of the United States the military law is due process." (emphasis supplied) In *Ex parte Quirin*, 317 U.S. 1 at 41 this Court assumed without deciding, that under the Fifth Amendment, courts-martial did not apply to persons not in the service. See also: *Hirshberg* v. *Cook*, 336 U.S. 210.

Likewise there is plentiful authority in the decided cases for the proposition that discharge (or dismissal) from military service is a bar to any military prosecution for offenses previously committed while the accused was in service. *Hirshberg* v. *Cooke*, 336 U.S. 210; *Ex parte Wilson*, 33 F. 2d 214 (D.C.E.D.Va. 1929); *U.S. ex rel. Viscardi* v. *MacDonald*, 265 F. 695 (D.C.E.D.N.Y. 1920); *U.S. ex rel. Santantonio* v. *Warden*, 265 F. 787 (D.C.E.D. N.Y. 1919); *U.S. ex rel Flannery* v *Commanding General*, 69 F. Supp. 661 (D.C.S.D.N.Y. 1946) wherein it was explicitly held that Article of War 94, 10 U.S.C. § 1566 (based on Act of March 2, 1863) was unconstitutional; *Ex parte Reaves*, 121 Fed. 848, 859.

D. Article 3(a) of the Uniform Code of Military Justice Deprives the Civilian Citizen of All Personal Rights Guaranteed in the Constitution

It is earnestly submitted that this Court cannot sustain the decision of the court of appeals in this case without destroying its own landmark decision in *Ex parte Milligan, supra.* Until now there has been full confidence that the *Milligan* case had preserved for all time the personal liberties guaranteed by the Fifth and Sixth Amend-

ments and that no mere act of Congress could effectively deny or deprive the civilian citizen of the protections afforded by those guarantees.

The principal effect of Article 3(a) of the Uniform Code of Military Justice, however, is to destroy completely those liberties insofar as a large segment of the people of this land are concerned. Under Article 3(a) a small or large segment of the citizens of this Country, size being dependent only upon the whim or caprice of military authority, can be deprived of those guarantees. This is not the fanciful, fearful imagining of petitioner or argument based on an unknown phantom bogey-man in the closet. This is real. This very case reveals completely and fully how those rights are denied to Robert W. Toth. This very case demonstrates, more effectively than can any words of counsel attempting to delineate future fears, that military use of Article 3(a) actually deprives a civilian citizen of constitutional privileges and rights previously thought to be sacred.

Even as the shepherd's shears denude the sheep of its protective coat of wool, so also has the United States Air Force acting by virtue of Article 3(a) deprived or sought to deprive Robert W. Toth of his right to be free from an unreasonable seizure, of his right to bail, of his right to an indictment by a grand jury, of his right to a trial by jury, of his right to subpoena witnesses to testify on his behalf, of his right to a prompt preliminary hearing, and of his right to counsel of his own choosing.

The Fifth Amendment provides that no person shall be "deprived of life, liberty or property, without due process of law". Is it due process to arrest a civilian in Pittsburgh, Pennsylvania, and to fly him, without affording a hearing or opportunity for hearing, to Korea, a foreign land some 13,000 miles away? Is it due process for armed soldiers to arrest a civilian as he enters his place of employment and to fly him to Korea some 13,000 miles away? Is it due process which would permit of no judicial inquiry into such conduct? If the Fifth and Sixth Amendments are the shields of our citizenry against oppression

of personal liberty, wherein lies their strength unless used to protect them from the conduct in question in this case?

In *Wong Wing* v. *United States*, 163 U.S. 228, this Court had before it the case of a Chinese alien who had been imprisoned on summary proceeding under a statute which provided that unlawful residence in this country was a crime punishable by one year at hard labor upon summary hearing before a justice, judge or commissioner. In striking down this provision as being constitutionally invalid this Court stated:

> "Applying this reasoning to the 5th and 6th Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those Amendments, and that even aliens shall not be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law."

If Congress cannot validly deprive the alien who is illegally in this country of these rights, the logical question is wherein lies the power to deprive the civilian citizen of those same rights? It is submitted that Congress has no such power.

II. THERE IS NO PROVISION IN THE UNIFORM CODE OF MILITARY JUSTICE WHICH AUTHORIZES THE APPREHENSON, CONFINEMENT AND TRIAL BY COURTS-MARTIAL OF CIVILIANS WHO HAD FORMERLY BEEN IN MILITARY SERVICE, BUT WHO HAD BEEN DISCHARGED PRIOR TO ANY ACCUSATION BEING MADE AGAINST THEM.

A. Despite a Legislative Purpose Expressed in Article 3(a) to Make the Honorably Discharged Civilian Amenable to Trial by Courts-Martial, Congress Failed to Enact Legislation Necessary to Permit Such a Person to be Held for Trial or to be Tried in Such a Manner

Even if it could be conceded that Congress had the authority under the powers granted it by Article 1 of the Constitution to enact legislation making civilians amenable

to military prosecution and even if it could be conceded that there was no bar in the Constitution in the form of the liberties and rights granted to all civilians by the Fifth and Sixth Amendments, the Uniform Code of Military Justice fails to provide for the apprehension, arrest, detention or confinement of civilians whom Congress attempted to make amenable to military law.

Petitioner does not concede the *power* of Congress to enact valid legislation of the type now under consideration. Petitioner does concede that the purpose of Article 3(a) is to permit trial by court-martial of discharged servicemen. Under this aspect of the case petitioner's position is that there is a failure of legislation in that there is no provision expressed or implied in the Uniform Code which would permit the arrest and confinement of civilians by the military.

In broad terms Article 3(a) provides that discharge from military service does not relieve a person from amenability to trial by courts-martial for a crime committed while in service. There is no language in Article 3(a) which, by broadest implication, provides for the arrest, taking into custody, or confinement of such a person. Article 3(a) merely details that such person is not relieved from amenability to trial by courts-martial notwithstanding the fact that the military status is terminated. The district court below in considering this phase of the case, in granting the writ of habeas corpus and in discharging Toth from custody held that there is an omission in the military code in that no provision is made for the arrest and detention of civilians.

B. There is no Legislation Enacted by the Congress Which Authorizes the Confinement or Physical Restraint of an Honorably Discharged Civilian by the Military

The correctness of the district judge's reasoning is made evident by examination of Article 9 of the code which deals with the "arrest", "apprehension" and "confinement" of persons subject to the Code.

Article 9(a) provides in pertinent part that:

"Confinement is the physical restraint of a person." At this juncture it should be made clear that Toth was in confinement from the moment of his arrest (in civilian terminology) or apprehension (in Air Force terminology) by military police on May 13, 1953 until he was discharged from custody by order of the district court on September 3, 1953.

Article 9(c) provides in pertinent part that ". . . a civilian subject to this code or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated." Plainly, Toth, as a civilian, had no commanding officer "to whose authority he is subject", and plainly there was no one who could legally order or effectuate his confinement or physical restraint.[8] Toth's connection with the service had been completely and finally severed upon his honorable discharge. The record shows that court-martial charges were filed against Toth over the signature of a Colonel Hurst (R. 17) and that no further action was taken by any alleged "commanding officer"; but, on the contrary, the Acting Secretary of the Air Force, who is not a commanding officer but a civilian, consented to the court-martial charges and ordered the Air Provost Marshal to effect Toth's apprehension. (R. 19-20)

Petitioner assumes that the word "arrest" as used in Article 9 means exactly what Article 9 says it means, that is, *restraint by order*. Confinement is likewise defined in

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[8] *The Manual for Courts-Martial, United States, 1951*, § 21(a) at p. 25 defines commanding officer as follows: "For this particular purpose the term 'commanding officer' shall be construed to refer to an officer commanding a post, camp, station, base, auxiliary airfield, Marine barracks, Naval or Coast Guard vessel, shipyard, or other place where members of the armed forces are on duty, and the officer commanding or in charge of any other command who, under Article 24, has power to appoint a summary court-martial."

Article 9 as the "physical restraint of a person", which is something that is not effectuated by simple order.[9] Toth was confined; he was physically restrained of his liberty by the Air Force and there was no commanding officer who could order such physical restraint. There can be no argument that Toth was not being confined at the time the petition for writ of habeas corpus was filed and this fact was admitted by respondent in his "Return and Answer To Rule to Show Cause". (R. 8)

Article 9(c) specifically provides for the confinement or *physical restraint* of civilians and there is and can be no denial of the fact that Toth was a civilian. Even if there were such a denial of such civilian status, Article 3(a) would make such a denial absurd by its reference to "termination of status". It must be clear beyond peradventure of doubt that when the military status terminates there is an *instanter* reversion to civilian status.

C. There is no Legislation Enacted by the Congress Which Authorizes the Apprehension or Arrest of an Honorably Discharged Civilian by the Military for an Offense Committed Prior to Discharge

The respondent would apparently argue that Article 7 conveys the authority to apprehend Toth and would likewise apparently argue, notwithstanding the clear provisions of Article 9 governing confinement, that Article 7 conveys the necessary authority to restrain him of his liberty. It is petitioner's position (1) that Article 7 does not authorize Toth's apprehension, and (2) even if it did, there is no authority to hold him in custody once his apprehension has been effected.

It is the clear purport and intent of Article 7 that the power to apprehend contained therein is but a statutory authorization to the military to permit the same type of ar-

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[9] "Sec. 20(c) *Confinement Prior to Trial.*—As used in this chapter, confinement is physical restraint imposed by either oral or written orders of competent authority, depriving a person of freedom pending the disposition of charges . . ." *Manual For Courts-Martial, United States, 1951* at p. 24.

rests in the military field that is permitted an arresting officer in the civilian sphere acting *without a warrant*. It is well settled that the peace officer may, without a warrant, arrest for a felony or for a misdemeanor involving a breach of the peace committed in his presence, or, if the offense is not committed within his presence, upon the reasonable belief that such an offense has been committed and that the person arrested committed it. 4 *Am. Jur., Arrest*, Sec. 22. It is this authority and this authority alone which is granted military "peace officers" by Article 7. Article 7 reads:

> "(a) Apprehension is the taking into custody of a person.
>
> (b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this code or to trial therunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it." (50 U.S.C. (Supp. V) 561).[10]

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[10] "19. APPREHENSION.—a. Who may apprehend.—All officers, warrant officers, petty officers, noncommissioned officers, and, when in the execution of their guard or police duties, air police, military police, members of the shore patrol, and such persons as are designated by proper authority to perform guard or police duties, are authorized to apprehend, if necessary, persons subject to the code or subject to trial thereunder upon reasonable belief that an offense has been committed and that the person apprehended committed it. See Article 7b.

Petty officers, noncommissioned officers, and enlisted persons performing police duties should apprehend a commissioned or a warrant officer offender only pursuant to specific orders of a commissioned officer, except where such action is necessary to prevent disgrace to the service, the commission of a serious offense, or the escape of one who has committed a serious offense. In all cases involving the apprehension of officers and warrant officers by petty officers, noncommissioned officers, and enlisted persons performing police duties, the individual effecting the apprehension will, immediately after such apprehension, notify the officer to whom he is responsible or an officer of the air police, military police, or the shore patrol." *Manual For Courts-Martial, United States, 1951*, p. 22.

Nothing could be clearer from this language and the regulations issued under it that this Article never contemplated a "holding in custody" and never contemplated anything more than the temporary securing of the person of an alleged offender. This is made even more certain by reference to regulation 19(d) promulgated under Executive Order 10214, issued February 8, 1951, which reads:

> "d. *Securing custody of alleged offender.*—There is a clear distinction between the authority to apprehend and the authority to arrest or confine. Any person empowered to apprehend an offender *is authorized to secure the custody of an alleged offender until proper authority may be notified*, the limitations (21a; Art. 9) on the power to arrest or confine notwithstanding." *Manual For Courts-Martial, United States, 1951*, p. 23 (16 F.R. 1303-1469). (emphasis supplied)

If it be assumed (though this is not conceded) that Toth was properly apprehended by Air Force police in Pittsburgh on May 13, 1953, what then would be the function of the military police under the code and regulations? *To hold him until proper authority was notified.* And who was proper authority? He had no commanding officer. He had no authority which could order his confinement. There was no statutory power to restrain him of his liberty. Indeed the air force police under the law, stretched as far as it can be to support their action, had no alternative but to release Toth from custody.

It is assumed that the respondent will argue that Congress would not legislate in such a confounding or abortive manner. The short answer to this is that Congress did so legislate.

It is assumed that the respondent will also argue that the new Uniform Code of Military Justice, in this part at least, is but a re-enactment of the Act of March 2, 1863, 12 Stat. 696, discussed previously. But that Act specifically held that, notwithstanding the discharge or dismissal of the person who in military service had violated the Act,

he "shall . . . *continue to be liable to be arrested and held for trial and sentence by a court-martial* . . . ." (emphasis supplied) And again the short answer is that that Act and the succeeding amendments and reenactments contained the express authority to arrest (apprehend) and hold for trial (confine). What the Act of March 2, 1863 did explicitly, the Uniform Code does not even do by implication.

It is the position of petitioner that Toth, the accused, was not a person "subject to the code" who could be apprehended by military authority under the provisions of Article 7(b). *Persons subject to this code* is a phrase of definite meaning. Article 2 of the Uniform Code enumerates twelve categories of persons who are subject to the code, but does not set out that the honorably discharged serviceman is such a person. Since Toth does not fit into any of the categories of persons who are subject to the code he is clearly not a person who can be apprehended by military police under the provisions of Article 7(b).

III. THE APPREHENSION AND CONFINEMENT OF A CIVILIAN CITIZEN BY MILITARY AUTHORITIES FOR TRIAL BY COURT-MARTIAL IS COMPLETELY DEVOID OF ANY SANCTION IN LAW AND IS COMPLETELY FOREIGN TO THE CONCEPTS OF THE GUARANTEES OF PERSONAL LIBERTY WHICH ARE EMBODIED IN THE CONSTITUTION.

In light of the history of Colonial days which gave rise to the American Revolution, in light of the clear limitation on the powers of Congress embodied in Article 1, Section 8, clause 14 of the Constitution, in light of the guarantees of personal rights and liberties so clearly set forth in the Fifth and Sixth Amendments, this case and the events which gave rise to the filing of the petition for writ of habeas corpus in the district court completely beggars the imagination. It is startling to conceive of any action or activities which could be more foreign to our cherished American heritage and our basic ideals of government than the action and activities in which the military power of our Air Force has indulged in arresting without war-

rant, in transporting to a foreign country without hearing, and in confining there for trial by court-martial, without any authority of law, a civilian citizen of this country.

While guilt is sincerely and wholeheartedly denied, the issue which is presented for consideration and determination is not the guilt or innocence of Robert W. Toth. The issue is whether the Constitution is yet the shield of our liberty; still the bulwark of due process of law; still the bastion of protection of the rights of our citizens from overweening military despotism. In another day and in another case this Court stated the issue in the following words:

> "No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured: withdraw that protection and they are at the mercy of wicked rulers, or the clamor of an excited people . . . . . " *Ex parte Milligan*, 71 U.S. 2, 118-119.

Even if it be conceded that in enacting Article 3(a) Congress was only attempting to provide that an honorable discharge from military service would not be an absolution for crimes previously committed, the Code is fatally defective. Such a purpose, no matter how noble may have been the thought which engendered it, is not sufficient to provide a vehicle for overriding the Constitution. Likewise, this noble purpose has by its very enaction provided an insidious vehicle for military dictatorship. If this case opens the door and permits the miliary trial of civilians

other factors and facets of the Code, looked to as a whole, must be considered. It is apparent that Congress in enacting Article 3(a) intended to cover only serious crimes, that is crimes involving maximum punishments of confinement of five or more years. But in reality even the most petty offenses can be included and actually are now included.

Under Article 56 the President is empowered to prescribe the punishments for offenses listed under the Code and under Executive Order 10214 a Table of Maximum Punishments was set out. *Manual For Courts-Martial, United States, 1951,* p. 219. In time of war this Table is automatically suspended as to certain offenses. *Ibid* p. 217, par. 127c. Further, the Table was suspended in the Far East Command (where Toth served) under date of May 29, 1951 by Executive Order 10247 with reference to punishments for violations of Articles 82, 85, 86(3), 87, 90, 91(1) and (2), 113 and 115. As a result a discharged serviceman would be subject to court-martial under Article 3(a) for such petty offenses as One Day Absence Without Leave (Article 86(3)) and Missing Movement (Article 87).

It is felt that this point need not be elaborated further. Deprecation of the power or avowal of the proposition that it will be used benignly and sparingly does not diminish or pale the incipient denial of civil liberties to millions of American citizens which is fostered by the Code. The Constitution is our protection against tyranny; the benign tyrant is equally objectionable to it as the evil one.

CONCLUSION

For the reasons hereinabove stated petitioner prays that the judgment of March 25, 1954 of the United States Court of Appeals for the District of Columbia Circuit be reversed; that the order of September 3, 1954 of the United States District Court for the District of Columbia be sustained; and that the mandate of this Court issue

directing that Robert W. Toth be released and discharged from the custody of respondent.

AL. PHILIP KANE
CHARLES V. KOONS
WILLIAM A. KEHOE, JR.
JOHN J. McGRATH
Attorneys for Petitioner

Of Counsel:

PETER F. FLAHERTY
JOSEPH H. RIDGE
JAMES F. SMITH
L. PAT McGRATH